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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

SUMMARY RECORD OF THE 7th PLENARY MEETING

Held at the Austria Center Vienna,
on Wednesday, 17 April 1991, at 9.30 a.m.

President: Mr. ABASCAL (Mexico)

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The meeting was called to order at 10.20 a.m.

CONSIDERATION OF THE QUESTION OF THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 44/33 OF 4 DECEMBER 1989 (agenda item 9) (continued)

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued) (A/CONF.152/11, A/CONF.152/12)

1. The PRESIDENT said that proposals had been submitted by China in regard to article 9 (A/CONF.152/L.3), by the United States for article 21 (A/CONF.152/L.7), by the United Kingdom for an amendment to article 22 (1) (A/CONF.152/L.4) and by China, Mexico, Spain, the Soviet Union and the United States of America for the text of the preamble (A/CONF.152/L.6).

Article 9 (A/CONF.152/L.3)

2. Mr. WANG Yangyang (China) said that his delegation had put forward a proposal for a new subparagraph (c) or alternatively for changes in subparagraph (a) (A/CONF.152/L.3). It did not object entirely to the text of article 9 as approved by the First Committee (A/CONF.152/11), but believed that it was not complete and might lead to uncertainty. The proposal aimed to bring the provisions of the article into line with those of article 13 (4) of the Hamburg Rules and article 23 (4) of the Convention on Multimodal Transport of Goods. The terminal operator was a connecting point between sea, land and air transport and stood at the crossroads of various laws governing carriage. Although the provision on the precautions which the operator could take with regard to dangerous goods was very important, the Convention should also contemplate the emergency measures he should be entitled to take in the aftermath of the actual danger. The article should enable the operator to eliminate the danger as quickly as possible, avoiding possible harm to persons, goods and other property. The cost of damage to the goods caused by those lawful measures should not be borne by the operator, but that point was not clearly brought out in the existing text.

3. Naturally, the Chinese delegation was aware of the difference between the terminal operator, who operated mainly on land, and the carrier, who operated mainly on the sea. Accordingly, in its proposal the wording of article 13 (4) of the Hamburg Rules had been slightly amended: the word "unloaded" had been altered to "removed". However, the responsibility of the operator to remove the danger was not diminished simply because the danger occurred on land, and payment of compensation to him had to be commensurate with his responsibility. His delegation was not averse to the idea that the liability of the operator should be determined judicially; however, it sought to make the existing provision more flexible and more complete, so as to contribute to the wider application of the Convention and not leave too many problems for the courts. Operators might see in the article as it stood a greater risk than they were ready to assume, since when the actual danger occurred the operator could be assumed not to have taken all the necessary precautions. That implied that he would be liable for damage caused by the emergency measures he took, a situation which might make it difficult for operators in various countries if they were subject to the Convention as it stood. If the liability of the operator was made more complete and his legitimate interests were protected, the Convention would make him more willing to assume his responsibility and therefore reduce loss and damage to goods. That was entirely in conformity with the aims of the Convention.

4. Ms. SKOVBY (Denmark) said that, as she understood it, the Chinese proposal covered cases where the operator knew that the goods were dangerous. Her understanding of the Convention was that if the operator knew the goods were dangerous he could take that into account, perhaps charging more for his services than usual; his liability would be considered under article 5 and he would have to pay compensation according to article 6. The Chinese proposal, however, spoke of no compensation in a case where the operator had taken the goods in charge knowing that they were dangerous; in such a case they could not be considered dangerous for him. The proposal was modelled on the Hamburg Rules, but it had to be borne in mind that the Hamburg Rules were very specific to sea transport and that the terminal operator was based on land and was not subject only to rules of law relating to carriage by sea.

5. Mr. HERBER (Germany) recommended that the Conference reject the Chinese proposal. The new subparagraph dealt with the situation in which the operator knew of the dangerous nature of the goods, but it did not fit logically into the article because that was not the situation contemplated by the introductory wording which would govern it. In order to accommodate the Chinese proposal the whole of the existing article would have to form a single paragraph and the proposed subparagraph (c) be made a second paragraph. Such major redrafting to provide a global rule at the last moment would be risky.

6. If the terminal operator knew that particular goods were dangerous, he had to reach some agreement on the subject with his contractual partner; between them they would certainly deal with the matter. It went without saying that if there was danger to persons the operator was obliged to take precautions. It would be dangerous to incorporate the Chinese proposal in the text at such a late stage. He did not believe the lacuna it sought to fill would cause great problems.

7. The PRESIDENT invited the Conference to vote on the proposal in the first paragraph of document A/CONF.152/L.3.

8. There were 2 votes in favour, 17 against and 17 abstentions. Having failed to obtain the required two-thirds majority, the proposal was not adopted.

9. Mr. WANG Yangyang (China) regretted that, for technical reasons, his delegation's proposal had not been distributed to delegations in the First Committee. It withdrew the remainder of its proposal.

10. Mr. LAVIÑA (Philippines) said that the proposal was an interesting one and should have been discussed in the First Committee.

11. Article 9 was adopted by 28 votes to 1, with 7 abstentions.

12. Mr. LARSEN (United States of America), in explanation of vote, said that the title of the article was "Special rules on dangerous goods"; it dealt with circumstances where dangerous goods were left with the operator without his knowing their dangerous character. It did not deal with environmental requirements for dealing with the goods or with rights of indemnity for the operator that would cover his liability to third parties.

Article 10

13. Article 10 was adopted by 32 votes to 1, with 3 abstentions.

14. Mr. LARSEN (United States of America), speaking in explanation of vote, said that his delegation had voted for article 10 in the belief that it now stated that the operator of a transport terminal might retain goods for satisfaction of unpaid charges that were due for keeping the goods, both during the period of his responsibility and thereafter. Thus the operator could claim damages for storage after he had placed the goods at the disposal of the person entitled to receive them. Furthermore, under article 10 (3) the operator might sell the goods to satisfy such charges, assuming that the requirements of due process of the State where the goods were located were observed.

Article 11

15. Mr. LAVIÑA (Philippines) questioned the use in paragraph 4 of the word "apprehended", the ordinary meaning of which related to criminal activities or to mental attitudes such as fear.

16. The PRESIDENT said that the Drafting Committee had no doubt decided to adhere to the corresponding provision of the Hamburg Rules, which used the same term.

17. Article 11 was adopted by 32 votes to 1, with 3 abstentions.

18. Mr. OCHIAI (Japan), speaking in explanation of vote, said that his delegation had abstained because it was very much afraid that the mention of the carrier in paragraph 4 would cause serious difficulties. If the carriage of goods consisted of segmented transport, which carrier was meant by the paragraph? For example, if three carriers were involved, did "the carrier" mean the first carrier, the second carrier, the last carrier, or all of them? Secondly, if the carrier mentioned in paragraph 4 did not have any branch or liaison office in the country where the transport-related services were performed by the operator, did the carrier have to go to that country and give the operator all reasonable facilities for inspecting and tallying the goods? If so, the paragraph might impose severe obligations on the carrier. The Conference existed to discuss not the carrier but the operator; if it imposed obligations on carriers it should act with extreme caution.

Article 12

19. Article 12 was adopted by 29 votes to none, with 7 abstentions.

20. Article 13 was adopted by 34 votes to none, with 1 abstention.

21. Article 14 was adopted by 36 votes to none.

22. Article 15 was adopted by 31 votes to none, with 5 abstentions.

23. Mr. RUSTAND (Sweden), speaking in explanation of vote, said that his delegation had abstained because the words "or derived from" had been deleted from the text of the article.

24. Article 16 was adopted by 36 votes to none.

25. The PRESIDENT said that the Conference had concluded its consideration of the articles approved by the First Committee (A/CONF.152/1'). He invited it to consider the articles approved by the Second Committee (A/CONF.152/12).

26. Article 17 was adopted by 36 votes to none.

27. Article 18 was adopted by 35 votes to none.

28. Article 19 was adopted by 36 votes to none.

29. Article 20 was adopted by 33 votes to 1.

Article 21

30. Mr. SWEENEY (United States of America), introducing his delegation's proposal in document A/CONF.152/L.7, said it was returning with great reluctance to a question which had already taken up much of the Conference's time. Discussions had indicated that it was unlikely any reservations would be made to the Convention. However, following the decision which the Conference had taken the previous day to amend the text which the First Committee had approved for article 1 (A/CONF.152/SR.6, para. 32), it would be necessary for his Government to enter a reservation in order to safeguard an important aspect of United States public policy. The scope of his delegation's proposal was deliberately confined to its specific concern, namely the problem of stevedores. It had been suggested to his delegation that adoption of the proposal would mean that a definition of "stevedore" would have to be added to article 1, but he did not consider that necessary. At the previous meeting, a number of delegations had indicated that courts in their countries interpreted the "Himalaya clause" very differently from courts in his own country. It would thus appear that the United States was the only State which would wish to take advantage of the proposed reservation.

31. His delegation had followed the work on the Convention closely, both in UNIDROIT and in UNCITRAL, for the past nine years, and believed it would be a valuable instrument for unifying legislation governing international trade. In his own country, for example, there was no federal law on operator liability; instead, as many as 50 different laws were applicable in different states. In some states, the operator was regarded as a bailee, and made strictly liable for all damage done to the cargo, while in others the principle of negligence, or the contractual principle, applied. It was important for United States exporters to know that a uniform liability regime applied in all countries, just as it was in the interests of all countries that the Convention should be ratified by the United States. The introduction of a uniform liability regime for terminal operators in international trade might well be followed by the introduction of a similar regime for domestic trade.

32. The United States Government would not consider ratifying a treaty if there was opposition to it from an important sector of industry. Currently, it enjoyed the cooperation of the stevedoring industry in its efforts to unify legislation, but such cooperation was forthcoming on the assumption that stevedores would not be treated more unfavourably than carriers. His delegation's proposal was designed to preserve the existing legal position in the United States by making provision for a reservation. Until such time as both the Hamburg Rules and the present Convention were universally accepted, the proposal would guarantee that stevedores would be liable for any damage done by them, either under the present Convention or under

(Mr. Sweeney, United States of America)

the maritime bill of lading. They would not have the privilege of exculpation under the "Himalaya clause", although their liability would be subject to a unit limitation of US$500 per package under the Hague Rules.

33. A number of amendments to the proposal had been suggested to his delegation. One had been to replace the word "determine" in paragraph 1 by the phrase "make a reservation"; another had been to add the phrase "and other contractors of the carrier" after the word "stevedores" in the same paragraph. A third, and more substantial idea, was to add at the end of the paragraph the words "provided only that such non-carrying intermediaries do not thereby exclude all liability". He suggested that a vote should first be taken to determine whether the proposal had majority support; if so, the various amendments could be put to the vote.

34. Mr. SMITH (Australia) said that, generally speaking, his delegation was not in favour of the idea that the Convention should provide for reservations, but on the particular point at issue he had considerable sympathy with the United States position. He could support the proposal if its adoption was thought necessary in order to secure the adherence of the United States to the Convention, but only on the clear understanding that in a State which had entered the reservation a non-carrying intermediary would not be permitted to exclude all liability.

35. Mr. BONELL (Italy) said his delegation greatly regretted that the Conference was now envisaging an amendment to the text of article 21 in order to provide for reservations. However, as one of the sponsors of the proposal concerning article 1 which the Conference had adopted at the previous meeting, he felt to some extent responsible for the situation which had prompted the United States proposal. It was clear that the United States regarded the Convention as a useful and important instrument which merited the widest possible acceptance, and since its reservation was intended to cover one specific problem, his own delegation would be prepared to accept it.

36. However, he was not sure that the best course would be to vote first on the principle of the proposal and secondly on the amendments which the United States representative had mentioned. The text as it stood was too vague; for example, he suggested that the word "mandatory" should be added after the word "applicable" in paragraph 1. It was essential that the text of the article should make clear that stevedores could be exempted from the requirements of the Convention only if they were subject to mandatory rules governing the carriage of goods, and that it was not the intention of the article to enable them, by a special contractual condition, to escape all liability whatsoever for their actions.

37. Mr. LAVIÑA (Philippines) said although he too had some sympathy for the United States proposal, he would have difficulty in agreeing to its being embodied in article 21. The rule that no reservations could be made to the Convention was a good one. He would vote in favour of the proposal if it could be incorporated in article 1, but would abstain if it was to take the form of an amendment to article 21.

38. Mr. RUSTAND (Sweden) shared the views expressed by the Italian representative. While his first reaction was to oppose the possibility of a reservation being entered, he could support the proposal, in view of its considerable importance for the United States, if paragraph 1 was amended by the addition of the words "provided only that such non-carrying intermediaries do not thereby exclude all liability".

(Mr. Ingram, United Kingdom)

and also stipulated that five of the States which ratified the Protocol or acceded to it should have a minimum tonnage under their flag. In order genuinely to harmonize international trade law and ensure that the Convention had sufficient standing to be taken seriously, an absolute minimum of 10 States should have to become parties to it for it to enter into force.

48. Mr. BONELL (Italy) said that all delegations not only hoped but also believed that the States they represented would seriously consider ratifying the Convention. It would be a fallacy, however, to think that the adoption of an instrument was in itself sufficient to motivate States to embark upon the process of ratifying it. In practice, many States were inclined to put off taking that step until the instrument came into force. In the light of long experience, he was convinced that the necessary number of ratifications or comparable steps should be kept as low as possible. Consequently, he was very strongly in favour of the present text of article 22.

49. Mr. ROMAN (Belgium) and Mr. ROJANAPHRUK (Thailand) expressed support for the proposal made by the Netherlands and the United Kingdom.

The meeting rose at 12.30 p.m.